TAN SRI DATUK DR MOHAN SWAMI & ANOR

v.

MISL & ASSOCIATES SDN BHD (NO 3)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-973-2003]
8 AUGUST 2003

CIVIL PROCEDURE: *Interim preservation of property - Order for - Principles - Agreement to sell shares - Breach - Application to preserve proceeds of sale in escrow - Whether justified - Whether property in danger of being dissipated - Balance of justice - Rules of the High Court 1980, O. 29 r. 2*

The defendant had agreed to sell a block of public quoted shares to the plaintiffs but had reneged on the promise when it sold a portion of the shares to a third party. The plaintiffs alleged that the sale of the portion of the shares was unlawful as they had acquired an equitable right over the same. The plaintiffs, in the circumstances, sued the defendant for breach of contract and pending that applied under O. 29 r. 2 Rules of the High Court 1980 for an interim order to preserve the proceeds of the sale. Contesting the application, the defendant argued that the application was in the nature of a mandatory injunction coupled with a Mareva injunction, and so implored the court to apply the principles governing such injunctions.

Held:

[1] Where one party has pledged to sell a property, or in this case a block of shares to another party, the purchaser acquires equitable rights over the shares. If the vendor proceeds to dispose off that same block of shares to a third party, he has violated the equity of the purchaser and any proceeds he holds from the sale he holds it as a constructive trustee. (p 508 c-d)

[2] The transaction here contemplates of an escrow arrangement for a period of 135 days wherein the defendant is obliged to keep the shares in escrow, that is, in safe keeping. Therefore, when the defendant disposed off the shares, the defendant is obliged to keep the proceeds of that sale in safety pending the plaintiffs' claim for the block of shares. (p 505 e)

[3] Although the application was phrased in a positive way requiring the defendant to do a certain act, the net result would be that the defendant would have to disclose the full particulars of all its transactions in the shares and cause the proceeds received to be paid into the account of the defendant's solicitors. These are not mandatory orders. But even if they are, it is settled law that whether or not such orders ought to be granted must be based on the all pervading concept of justice. The application, further, was not in the nature of a Mareva injunction. It is trite that a Mareva injunction covers property or assets that are not necessarily the subject matter of a cause of action. (pp 492 e-h & 496 h-i)

[4] It was clear that if the orders sought for were not granted, there was a real risk that the plaintiffs would not be able to acquire the shares that had been sold should they succeed at the trial proper. On the other hand, no prejudice would be occasioned to the defendant because the proceeds of the sale would be held in the account of its solicitors. These apart, several factors would also tilt in favour of preserving the shares already sold or the proceeds thereof. These include the facts that: (i) the defendant was a mere RM1,002 company whilst the shares that were sold came up to approximately RM30 million; (ii) the defendant had no income generating activity; and (iii) some of the defendant's shareholders were citizens of Singapore and there was a real likelihood of the sale proceeds being dissipated out of jurisdiction. (pp 494 c & 488 d-e)

[Order in terms of application.]

Case(s) referred to:

Alan Estates Ltd v. WG Stores Ltd & Anor [1981] 3 WLR 892 ***(refd)***
AW Scott [1955] 71 LQR 39 ***(refd)***
Beatty v. Guggenheim Exploration Co [1919] 225 NY 380 ***(refd)***
Boardman v. Phipps [1967] 2 AC 46 ***(refd)***
BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors [2000] 2 CLJ 197 CA ***(refd)***
English v. Dedham Vale Properties Ltd [1978] 1 All ER 382 ***(refd)***
Eves v. Eves [1975] 1 WLR 1338 ***(refd)***
Films Rover International Ltd & Ors v. Cannon Film Sales Ltd [1986] 3 All ER 772 ***(refd)***
Gibb & Co v. Malaysia Building Society Bhd [1982] CLJ 185; [1982] CLJ (Rep) 99 FC ***(dist)***
HA Securities Sdn Bhd v. Ng Kong Yeam [1993] 4 CLJ 433 HC ***(refd)***
Hussey v. Palmer [1972] 1 WLR 1286 ***(refd)***
Keech v. Sandford [1726] Sel Cast King 61 ***(refd)***
Johnson v. Tobacco Leaf Marketing Board [1967] VR 427 ***(refd)***

Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 HC ***(refd)***

Ng Tien & Anor v. Chow Nim Yan [1990] 2 CLJ 937; [1990] 1 CLJ (Rep) 209 SC ***(refd)***

Paragon Finance plc v. DB Thakerar & Co (a firm), Paragon Finance plc & Anor v. Thimbleby & Co (a firm) [1999] 1 All ER 400 ***(refd)***

Polini v. Gray [1879] 12 Ch D 438 ***(refd)***

Roy R Muttiah v. Hj Mohamed Zuki & Anor [1985] 1 MLJ 265 ***(refd)***

Sebaya Sdn Bhd v. Syarikat Bekerjasama Ladang Kelapa Sawit Pegawai-pegawai Negeri Pahang Bhd [1980] 2 MLJ 23 ***(refd)***

Shamsudin Shaik Jamaludin v. Kenwood Electronics Technologies (M) Sdn Bhd [1999] 8 CLJ 544 HC ***(refd)***

Shepherd Homes Ltd v. Sandham [1971] 1 Ch 340 ***(dist)***

Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 ***(dist)***

Teknik Cekap Sdn Bhd v. Villa Genting Development Sdn Bhd [2000] 7 CLJ 385 HC ***(refd)***

Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd [2002] 1 CLJ 566 CA ***(dist)***

TR Hamzah & Yeang Sdn Bhd v. Lazar Sdn Bhd [1985] 2 MLJ 45 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 1, O. 29 r. 2(1)

Rules of the Supreme Court, O. 50 r. 3

Other source(s) referred to:

Gareth Jones & William Goodhart, *Specific Performance*, pp 129-130

Iain S Goldrein & KHP Wilkinson, *Commercial Litigation: Pre-Emptive Remedies*, p 203

Supreme Court Practice, 1993, vol 1, part 1, London, Sweet & Maxwell, p 529

For the 1st plaintiff - Cyrus Das (K Mohan & Brian Jit Singh); M/s Shook Lin & Bok

For the 2nd plaintiff - Wang Kuo Shing (Woo Kai Hung); M/s Shook Lin & Bok

For the defendant - Wong Chong Wah (Lim Hon Sang, Lim Koon Huan & Harold Tan); M/s HS Lim & Malik

Christopher Leong (Lim Tuck San); M/s Chooi & Co watching brief for Ong Seang San

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of a summons in chambers in encl. 16, both the plaintiffs sought for the following prayers:

(1) the defendant be required to take all or such steps as may be necessary to bring, acquire or transfer into its Central Depository System ('CDS') account such number of Sitt Tatt Bhd shares as would result in the defendant holding or maintaining in its CDS account 62,562,500 non-moratorium ordinary shares of Sitt Tatt Bhd.

(2) alternatively, that the defendant file in court an affidavit to disclose full particulars of all its transactions of and in Sitt Tatt Bhd shares between 3.6.03 and 16.6.03 and the defendant do cause all or any proceeds received from such transactions to be paid into this Honourable Court.

Dato' Dr. Cyrus Das assisted by Mr. K. Mohan and Mr. Brian Jit Singh acted for the first plaintiff by the name of Tan Sri Datuk Dr. Mohan Swami. While Mr. Wang Kuo Shing assisted by Mr. Woo Kai Hung acted for the second plaintiff by the name of Dato' Pang Wee Pat. The defendant, on the other hand, was represented by Mr. Wong Chong Wah assisted by Mr. Lim Hong Sang, Miss Lim Koon Huan and Mr. Harold Tan. I must also mention that both Mr. Christopher Leong assisted by Mr. T.S. Lim held a watching brief for Ong Seang San.

At the outset, Dato' Dr. Cyrus Das (hereinafter referred to as "Dato' Das") submitted that both the plaintiffs were not proceeding with prayer one (1) of encl. 16 and that they are reserving, without prejudice, their right in advancing prayer one (1) of encl. 16 in the near future, if necessary. Dato' Das then applied to make an oral amendment to prayer two (2) of encl. 16 and the proposed amendments were worded in these words:

(2) alternatively, that the defendant file in court an affidavit to disclose full particulars of all its transactions of and in Sitt Tatt Bhd shares between 3.6.03 and 16.6.03 and the defendant do cause all or any proceeds received from such transactions to be paid into the defendant's solicitors account of Messrs H.S. Lim & Malik for which they are to open a special fixed deposit account and tender a copy of the receipt to the plaintiffs' solicitors and the Registrar of this court. Further that this order be complied with within three (3) days of the order made hereon.

Mr. Wang Kuo Shing (hereinafter referred to as "Mr. Wang") supported the stand as adopted by Dato' Das and, to be specific, he too supported the proposed oral amendments to prayer two (2) of encl. 16. Since Mr. Wong Chong Wah (hereinafter referred to as "Mr. Wong") left the matter of the proposed oral amendments entirely to me to decide, I forthwith allowed the oral amendments to prayer two (2) of encl. 16.

Mr. Wong pointed out that the prayers in encl. 16 were phrased and framed in the alternative. And so, according to him, the question of preserving the right to go back to prayer one (1) cannot arise. According to him, both the plaintiffs have chosen and they chose the amended prayer two (2) of encl. 16 to advance their cause.

I merely took note of these verbal exchanges.

To The Heart Of The Matter

The application in encl. 16 sought to preserve the property which was the subject matter of the present suit, namely, the shares in Sitt Tatt Bhd (hereinafter referred to as "the company") which the defendant was obliged to sell to the plaintiffs. Under the Buy Back Agreements as seen in encl. 5 of exhs. "TS7" and "TS8", the defendant was obliged to sell to the plaintiffs 62,650,500 ordinary non-moratorium shares of the company. The defendant was obligated not to deal with those shares unless and until the plaintiffs failed to honour the buy-back arrangement within the time stipulated. The following factual matrix must be emphasised:

(a) That the existence of the block of shares, for at least a minimum period of four (4) months from the date of listing, was an express term of the Buy-Back Agreements. By cl. 4 thereof (see exh. "TS8" at p. 141 of encl. 5) it is declared that the defendant has the right to sell the shares without notice to the plaintiffs if the plaintiffs failed or neglected or refused to complete the purchase within the four (4) months period. This may conveniently be styled as the window period of four (4) months.

(b) Implicit in this express undertaking would be this. That at any time during the window period of four (4) months, the defendant would be able to complete its side of the bargain by transferring and registering the shares to the plaintiff when called upon.

(c) Towards this direction, the plaintiffs had already given notice to complete the Buy-Back Agreements at 10am on 7 July 2003 as reflected at encl. 5A, exh. "TS14" of p. 486 to p. 487, and this would in turn extinguish any right in the defendant to sell those shares after the window period of four (4) months.

(d) In addition to that, the defendant was expressly obliged to keep the shares in escrow for a period of 135 days from completion of the Share Sale Agreement in order to facilitate the purchase of those shares by the plaintiffs (see Schedule 5 to the Supplemental Agreement as reflected in encl. 5 at exh. "TS5" at p. 101 to p. 108 thereof).

The events that unfolded showed that between 3 June 2003 and right up to the service of the injunction order of this court on 16 June 2003, the defendant has in breach of its obligations under the Buy-Back Agreements and in breach of the escrow sold more than 19 million shares of the company or almost 30% of the shares which were to be sold to the plaintiffs. So it was the stand of the plaintiffs that due to the wrongful acts of the defendant, the shares that have already been sold or the proceeds thereof must be preserved in order to ensure that any ultimate relief granted to the plaintiffs would not be rendered nugatory by the non-availability of the shares, or by the defendant simply not having the funds to acquire the shares.

According to Dato' Das, the plaintiffs' primary concern, at present, was the sum of approximately RM30 million which the plaintiffs believe that the defendant had made by selling about 20 million shares in the open market. These figures, according to Dato' Das, were mere approximation by necessity because the defendant has not candidly come forward to declare the exact amount of the shares which the defendant had sold and the exact amount which the defendant had earned from those sales.

Dato' Das further submitted that from the figures which the plaintiffs have, it was estimated that the defendant had sold about 19.1 million shares with a price range of between RM1.25 at the lower end and RM1.65 at the upper end. Thus, the total amount earned, according to Dato' Das, would be anywhere between RM23.8 million and RM31.5 million. Incidentally, these details can be seen at paras. 8 and 9 of encl. 22. The plaintiffs' immediate concern was the whereabouts of these sums of about RM30 million and the fear that it be distributed or dissipated before the trial of the action. According to Dato' Das, the defendant must come forward and declare how much they had sold and how much they had made and where the funds are presently kept. It was the submissions of Dato' Das that where one party has pledged to sell a block of shares to another party, the purchaser acquires equitable rights over those shares. And if the vendor proceeds to dispose off that same block of shares to a third party, the vendor has violated the equity of the purchaser and any proceeds the vendor holds from the proceeds of the sale the vendor holds as a constructive trustee. Dato' Das enthusiastically submitted that it is this very fund that was created by the unlawful sale that the plaintiffs are seeking to preserve by way of interim preservation. It is, according to him, the very subject matter of the writ.

It seemed to me that what the plaintiffs are asserting can compendiously be put in this way. That the plaintiffs are asserting that those shares and the proceeds from the sale of some of those shares were pledged to the plaintiffs and to be kept in escrow and they cannot belong to the defendant absolutely. So, it was imperative that the funds created by the sale of some of those shares be kept intact.

The situation is certainly grave. The facts would bear this out. Now, several factors would go to show that this court should make the necessary orders in the nature of "unless orders" so that there would be preservation of the shares already sold or preservation of the proceeds of sale of those shares because there is a risk nay a real risk that they would not be available at a later date. These factors may be stated in these terms:

(i) the defendant is a mere RM1002 company, whereas the shares that were sold came up to approximately RM30 million;

(ii) the defendant has no business or income generating activity; and if the sale proceeds are used up, the prospects of the defendant later acquiring the shares or having funds to acquire the shares are indeed remote; and

(iii) a number of the shareholders of the defendant are citizens or residents of Singapore and there is a likelihood of the sale proceeds being remitted or dissipated out of jurisdiction.

On behalf of the plaintiffs, the following submissions were made. That acting in complete breach and in total disregard of the Buy-Back Agreements together with the escrow arrangement, the defendant now held the proceeds of the sale of those shares as constructive trustee. That the Singaporean shareholders have knowledge of the escrow and they were likewise to be considered as trustees of the proceeds thereof. It is now an established principle of law that where rights are put in escrow, the grantor of the escrow – referring to the defendant, cannot dispose of the subject property whilst the escrow subsists. Lord Denning MR writing for the Court of Appeal in the case of *Alan Estates Ltd. v. W.G. Stores Ltd. And Another* [1981] 3 WLR 892, aptly said at p. 898 of the report:

> One thing is clear. Whilst the conditions are in suspense, the maker of the escrow cannot recall it. He cannot dispose of the land or mortgage it in derogation of the grant which he has made. He is bound to adhere to the grant for a reasonable time so as to see whether the conditions are to be fulfilled or not.

It is also trite law that the circumstances in which a constructive trust can arise are unlimited in its range. Jemuri Serjan SCJ had occasion to say something about constructive trust in the case of *Ng Tien & Anor v. Chow Nim Yan* [1990] 2 CLJ 937; [1990] 1 CLJ (Rep) 209, SC. There his Lordship writing for the then Supreme Court cited with approval the speech of Slade J, in the case of *English v. Dedham Vale Properties Ltd* [1978] 1 All ER 382, and his Lordship said at p. 376 of the report (the *Ng Tien*'s case):

> As such since he had acted and still acts in a fiduciary capacity which imposes relevant fiduciary duties upon him, he can also be held as a constructive trustee. Again in that same case Slade J at p. 398 said:
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> > I do not think that the categories of fiduciary relationships which give rise to a constructive trusteeship should be regarded as falling into a limited number of strait-jackets or as being necessarily closed. They are, after all, no more than formulae for equitable relief. As Ungoed-Thomas J said in *Selangor United Rubber Estates Ltd v. Cradock (No 3)* ([1968] 2 All ER 1073 at 1097):
> >
> > The court of equity says that the defendant shall be liable in equity, as though he were a trustee. He is made liable in equity as trustee by the imposition or construction of the court of equity. This is done because in accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee. Trusteeship and constructive trusteeship are equitable conceptions.
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> With respect, we agree with this view on the formulation of a category of constructive trusteeship.

The circumstances where constructive trust may arise have been lucidly stated in the case of *Paragon Finance plc v. DB Thakerar & Co (a firm), Paragon Finance plc and another v. Thimbleby & Co (a firm)* [1999] 1 All ER 400 CA, Civil Division. There Millett LJ speaking and writing a separate judgment for the Court of Appeal, succinctly said at p. 409 of the report:

> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent

appropriation of the property to his own use is a breach of that trust. Well-known examples of such a constructive trust are *McCormick v. Grogan* [1869] LR 4 HL 82 (a case of a secret trust) and *Rochefoucald v. Boustead* [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v. Morgan* [1952] 2 All ER 951, [1953] Ch 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'.

Dato' Das submitted further. He said that the amended prayer two (2) of encl. 16 is strictly not couched in a mandatory fashion because it requires the defendant to do something within themselves and gives an assurance to the court that the funds are intact. He pointed out that the distinction between mandatory and prohibitory is overridden by a greater factor, namely, wherein lie the balance of justice. He then posed a pertinent question: would greater injustice be caused by the grant or the refusal of the interlocutory order to either party? And he advanced an answer in this fashion. That, on the facts, there is a risk of greater injustice to the plaintiffs if an interim order is not granted to preserve the fund. The defendant, on the other hand, would not suffer any prejudice because the fund is in the safekeeping of its own solicitors. The defendant cannot, on the one hand, say that they are able and willing to sell the block of shares to the plaintiffs but at the same time and, on the other hand, say that they want to use the money. Foremost in the minds of the plaintiffs would be preservation of the property which is the subject matter of the action. Indeed O. 29 r. 2 of the Rules of the High Court 1980 ("RHC") recognises and gives the courts the necessary jurisdiction to make orders for the interim preservation of property. In its original text, O. 29 r. 2 of the RHC is worded in this way:

2 Detention, preservation, etc of subject-matter of cause or matter (O. 29 r. 2)

(1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

(2) For the purpose of enabling any order under paragraph (1) to be carried out the Court may by the order authorise any person to enter upon any immovable property in the possession of any party to the cause or matter.

(3) Where the right of any party to a specific fund is in dispute in a cause or matter, the Court may, on the application of a party to the cause or matter, order the fund to be paid into Court or otherwise secured.

(4) An order under this rule may be made on such terms, if any, as the Court thinks just.

(5) An application for an order under this rule must be made by summons.

(6) Unless the Court otherwise directs, an application by a defendant for such an order may not be made before he enters an appearance.

I had occasion to consider the ramifications of O. 29 r. 2(1) of the RHC in the case of *Teknik Cekap Sdn Bhd v. Villa Genting Development Sdn Bhd* [2000] 7 CLJ 385. At p. 388 of the report, after reproducing in verbatim O. 29 r. 2(1) of the RHC, I had this to say:

> Basically, the attractive feature of this rule is to provide for the preservation of property (*Chaplin v. Barnett* [1912] 28 TLR 256; *Nicholas v. Gan Realty Sdn Bhd* [1970] 2 MLJ 89; and *Tan Lay Soon v. Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener)* [1992] 2 MLJ 434) and the power of the court to act under this rule comes from its inherent jurisdiction with the ultimate motive of advancing and promoting a fair trial (*S v. S, W v. Official Solicitor* [1970] 3 All ER 107). Either the plaintiff or the defendant is entitled to seek the assistance of this rule. If the sum of money is identifiable, then the process of preservation under this rule may be resorted to. Indeed this rule may be invoked to preserve an identifiable sum of money that arises from any criminal activity (*West Mercia Constabulary v. Wagener* [1981] 3 All ER 378 and *Chief Constable of Kent v. V & Anor* [1982] 3 All ER 36). So long as the money can be preserved, this rule may be vigorously resorted to (*Polini v. Gray* [1879] 12 Ch D 438).

Indeed *Polini v. Gray* [1879] 12 Ch D 438 is an interesting case. There, Jessel MR was of the view that the court's jurisdiction to make interlocutory orders extends to protection of a fund in order to ensure that the successful party in the litigation does not "obtain merely a barren success" (see p. 443 of the report). I think, I would do justice to Jessel M.R. if I were to reproduce in verbatim his sound judgment. At p. 443 of the report, this was what his Lordship said:

> The question before us is this: An action is brought to determine the rights of claimants to a fund. The Plaintiffs fail in the Court of first instance and in the Court of second instance, but are about, bona fide, to prosecute an appeal to the Court of ultimate resort. The Plaintiffs allege that that appeal will be nugatory if the fund is paid out to the Defendants, and that if the Plaintiffs should ultimately succeed in the House of Lords, that success will be useless to them unless an interim order is made for preserving the fund. I say they so contend, and, assuming that contention to be correct in fact, the question is, whether this Court has jurisdiction to prevent such a consequence. It appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success. That principle, as it appears to me, applies as much to the Court of first instance before the first trial, and to the Court of Appeal before the second trial, as to the Court of last instance before the hearing of the final appeal. The rule under the Judicature Act is rule 3 of Order LII., which is this: It shall be lawful for the Court or a Judge upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property being the subject of such action.

Although the amended prayer two (2) of encl. 16 are phased and framed in a positive way wherein it required the defendant to carry out certain acts, the net results would be that the defendant has to file in court an affidavit to disclose the full particulars of all its transactions in the shares of the company between 3 June 2003 and 16 June 2003 and the defendant too has to cause all or any proceeds received from such transactions to be paid into the defendant's solicitors account of Messrs. H.S. Lim & Malik who in turn has to open a special fixed deposit account and to tender a copy of the receipt to the plaintiffs' solicitors as well as to the registrar of this court and the defendant too has to comply with this order within three days from the date of its order. These orders are not mandatory in the sense of having to convey the proceeds of those shares to the plaintiffs. In fact, the proceeds of those shares are to be placed in the special account of the defendant's solicitors. Now, even if those orders as sought for in the amended prayer two (2) of encl. 16 are construed as mandatory as suggested by Mr. Wong, yet it must be borne in mind and indeed it is settled law that whether or not such orders ought to be granted must be based on the all pervading concept of justice. In the words of Gopal Sri Ram JCA in the case of *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors* [2000] 2 CLJ 197, "At the end of the day the court has to determine where the justice of the particular case lies." In the same vein, the

speech of Hoffmann J in the case of *Films Rover International Ltd and Others v. Cannon Film Sales Ltd* [1986] 3 All ER 772 are also quite apt and should be referred to. There at p. 780 to p. 781, his Lordship had this to say:

> I would respectfully agree that there is no inconsistency between the passage from Megarry J and what was said in the *Cyanamid* case, But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', ie useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

In *Shamsudin bin Shaik Jamaludin v. Kenwood Electronics Technologies (M) Sdn Bhd* [1999] 8 CLJ 544, I had occasion to say something about interlocutory mandatory injunction and this was what I said (see p. 559 of the report):

> I cannot help but observe that in cases where the parties sought for an interlocutory mandatory injunctions, the principles enunciated in the *American Cyanamid* have not been followed and at the most it was referred to in passing only. In my judgment, the conditions to be fulfilled before an interlocutory mandatory orders to be granted may be listed as follows:
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> (1) The applicant must prove by affidavit evidence that his application is an exceptional and extremely rare case which merits the order prayed for.
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> (2) The applicant must show that his case is clear and one which the court thinks ought to be decided at once in his favour.
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> (3) The applicant must show a clear case for relief or a high degree of assurance that the injunction, if granted, would rightly be granted.
>
> And this list is not exhaustive for it may expand from time to time as the years go by.

I pause here for a moment. I must now refer to two authorities. One would be the case of *T.R. Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn Bhd* [1985] 2 MLJ 45, a decision of the then Federal Court where an interim surrender of the architect's letter of release was ordered. The other would be the case of *Roy R. Muttiah v. Haji Mohamed Zuki & Anor* [1985] 1 MLJ 265, where Shaik Daud J (as he then was) ordered certain documents to be surrendered.

The bottom line would be this. If the orders that were sought for in the amended prayer two (2) of encl. 16 are not granted, there is a real risk to the plaintiffs of not being able to acquire the shares that have been sold should the plaintiffs succeed at the trial proper. The justice of the case was certainly in favour of granting the amended prayer two (2) of encl. 16. There would certainly be no prejudice occasioned to the defendant because the proceeds of the sale of those shares would be held in the account of the defendant's solicitors.

Lest I be accused of an oversight, I must now consider the submissions of Mr. Wang, the learned counsel for the second plaintiff. In essence, Mr. Wang supported the submissions of Dato' Das on every aspect of this case. But all the same, his submissions too were quite interesting.

It cannot be denied that the defendant, through its learned counsel by the name of Mr. Wong, has vigorously opposed the summons in chambers application in encl. 16 particularly the amended payer two (2) thereof. It was the stand of Mr. Wong that the amended prayer two (2) of encl. 16 was in the nature of a mandatory injunction coupled with a Mareva injunction. And so Mr. Wong implored this court to apply the principles governing mandatory injunction and Mareva injunction generously. Mr. Wang took exception to the submissions of Mr. Wong. Mr. Wang rightly submitted that:

(1) the orders sought for in the amended prayer two (2) of encl. 16 are not a mandatory injunction nor is it in the nature of a mandatory injunction;

(2) the orders sought therein are also not in the nature of a Mareva injunction; and

(3) shorn of these technical approaches, the central issue should be whether "there is something which ought to be done for the security of the property.

Mr. Wang pointed out that the application in encl. 16 was made under O. 29 r. 2 of the RHC. It was an application which was distinct from an application for an injunction. He emphasised that an application and an order under O. 29 r. 2 of the RHC is separate and distinct from applications for an injunction although the effect of an O. 29 r. 2 order may have some similarities

to that of an injunction. He said that O. 29 r. 2 of the RHC can only apply to property which is the subject matter of the suit. He said that the plaintiffs here are concerned about the proceeds of the sale of those shares. He also said that O. 29 r. 2 of the RHC cannot apply to any other property of the defendant which is not the subject matter of the suit. He then referred to a book entitled *"Commercial Litigation: Pre-Emptive Remedies"* by Iain S. Goldrein and K.H.P. Wilkinson, and he said that the learned authors of that book had clearly shown the distinction in the classification of orders such as a Mareva injunction, an Anton Piller order and an order under O. 29 r. 2. He then referred to p. 203 of that book where the learned authors wrote:

> 7. Anton Piller/Mareva – different creatures The relative coincidence of conception of these orders should not blind one to their essentially different characteristics, which in turn justify the application of different principles:
>
> (a) Anton Piller:
>
> (i) The conduct sought to be restrained is always alleged to be wrong (infringement of copyright, etc.).
>
> (ii) The order is substantially mandatory.
>
> (b) Mareva:
>
> (i) The conduct sought to be restrained is not of itself, a wrong (the dissipation of assets), and
>
> (ii) The order is substantially prohibitory.
>
> (c) Orders sharing similar characteristics: Interim preservation orders and orders for delivery up, pursuant to Ord. 29, are dealt with at pp. 229 and 233.

Mr. Wang emphasised that the amended prayer two (2) of encl. 16 was to prevent the defendant from dealing with the funds that came about after the disposal of some of those shares. It was purely to prevent the defendant from dissipating the funds which represent the shares that were disputed. According to him, it was prohibitory in nature and not mandatory. He pointed out that the placement of those funds with the defendant's own solicitors was the mechanism to put the prohibitory order into effect. He posed a pertinent question, phrased in this way:

> How else could the plaintiffs ensure that the funds are not dissipated or disposed of or transferred out of the jurisdiction?

Mr. Wang rightly pointed out that the courts are stringent in granting interim/interlocutory mandatory injunctions because those reliefs tended to give to the prospective plaintiff the primary relief in the claim which the prospective plaintiff had sought for in the main cause of action. According to Mr. Wang, encl. 16 was not like that at all. According to him, by the very tenor of encl. 16, the plaintiffs would not get the money nor the shares. Rather the plaintiffs merely want the defendant not to dissipate or dispose of those funds which represent the shares which in turn are the subject matter of the present dispute.

Mr. Wong, the learned counsel for the defendant, relied on a few authorities to drive home the all important message that once the relief of mandatory injunction sought in an interlocutory injunction is the primary relief which the applicant is seeking in his main action, then the applicant must, in order to succeed, go to the extent of convincing the court that he has a high degree of success at the trial of his action. The authorities relied upon by Mr. Wong may be listed not in its chronological order:

(1) *Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd* [2002] 1 MLJ 33, CA, which relate to an interlocutory mandatory injunction to compel the delivery of vacant possession;

(2) *Gibb & Co. v. Malaysia Building Society Bhd* [1982] CLJ 185; [1982] CLJ (Rep) 99, FC, which relate to the delivery of documents of title in the context of an interlocutory injunction before trial and that interlocutory injunction amounting to a final relief;

(3) *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150, FC, which relate to an industrial relations matter in the context of an interlocutory injunction couched in prohibitory terms which was in effect a mandatory injunction in substance and effect; and

(4) *Shepherd Homes Ltd v. Sandham* [1971] 1 Ch 340, was a case of a breach of a negative covenant by the erection of a fence and the covenantee applied for a mandatory injunction.

Now, the above four cases are not cases in relation to the preservation of property. They are cases on mandatory injunctions and the law distilled in these cases have been applied by me in the course of adjudicating other cases. Significantly too, encl. 16 was not in the nature of a Mareva injunction. It is trite that a Mareva injunction covers property or assets that are not necessarily the subject matter of the cause of action. A Mareva injunction is usually granted in order to prevent the disposal of the assets generally of a potential judgment debtor who is desirous to dissipate the assets so as to avoid the assets from being used to satisfy a judgment debt. Briefly put, in law, a Mareva is a pre-

judgment freezing of the defendant's assets by way of an injunction to the limit of the plaintiffs' claim to satisfy any eventual judgment the plaintiffs might obtain. It is not like our application in encl. 16 for preservation of the specific subject matter of the suit pending trial. So all the authorities relied upon by Mr. Wong in relation to Mareva injunctions and the conditions to be fulfilled for its grant cannot be applied when adjudicating encl. 16 particularly the amended prayer two (2) thereof.

I am concerned here with the preservation of property. And the plaintiffs are entitled to apply by way of encl. 16 "at any time after commencement of proceedings" (see the *Supreme Court Practice*, 1993, vol. 1, Part 1, London, Sweet & Maxwell at p. 529). And further down the same page of the Supreme Court Practice, 1993, the following apt write-ups appear:

> 'Preservation'; injunction – This rule extends to every case where the Court sees that as between plaintiff and defendant there is something which ought to be done for the security of the property (*Chaplin v. Barnett* [1912] 28 TLR 256).
>
> Where sums which are identifiable as resulting from the first defendant's alleged criminal activity have been paid into the second defendant's bank account, the Court has power to make an order restraining the second defendant until further order from dealing with any money in his account which has accrued since a specified date. In this way the Court can preserve the proceeds of an alleged crime held in a bank account and thus preserve material evidence for use in the prosecution of the offender and also enable the proceeds to be restored to the rightful owner after the conviction of the alleged offender (*West Mercia Constabulary v. Wagener* [1982] 1 WLR 127; [1981] 3 All ER 378). Applied in *Chief Constable of Kent v. V.* [1983] QB 34; [1982] 3 All ER 36, CA.

In *Teknik Cekap Sdn Bhd v. Villa Genting Development Sdn Bhd (supra)*, I refused to grant an order under O. 29 r. 2(1) of the RHC. The action in that case was for the recovery of a debt. There was no specific property which was the subject matter of the cause of action. Consequently, the first moiety referred to in that case could not be dealt with as a specific asset and be placed in a separate account.

Be that as it may, the funds must be preserved. There is a real danger of the funds derived from the sale of those shares to be dissipated or even taken out of the jurisdiction of this court. If this happens, then it will render the present proceedings nugatory and this in turn will give rise to a grave injustice to the plaintiffs.

In regard to the affidavit in reply that was affirmed by Lai Moon Kwai, Albert for the defendant on 10 July 2003 as seen in encl. 21, Dato' Das has this to say.

That there were two very glaring omissions in the deponent's affidavit in encl. 21 which was said to be extremely disturbing. At p. 4 of that affidavit in reply in encl. 21, the deponent deposed as to the several unrelated matters but the deponent failed to depose as to the amounts which the defendant have made out of the proceeds from the sale of the shares and as to where the funds are presently located. These failures were said to be very disturbing because the proceeds were said to belong to the defendant's company and not to its shareholders. It was said that it would be the easiest thing for the defendant if it had not already utilised or dissipated the funds to show bank records that the funds are being kept intact. This was especially so because the sum involved was not a trifle amount but rather a huge sum in the region of at least RM30 million. There was no mention at all in the deponent's affidavit in reply in encl. 21 as to the whereabouts of the funds nor any information provided on this most important question. Instead encl. 21 has gone on to deal with other extraneous factors such as the complaint that the statement of claim had not yet been filed, that there are related proceedings brought by the company pending before the Commercial one (1) court and the defendant's declarations that it was able and willing to complete the sale. Indeed if it was true that the defendant was able and willing to complete the sale then the easiest thing for the defendant to do would be to be candid and frank to this court and proceed to identify the existence of the funds amounting to RM30 million and at the same time assuring this court that the funds are, in fact, safe. Of pertinence to note would be the absence of an undertaking in the affidavit in reply in encl. 21 that the funds would be kept safe. So the lack of frankness or forthrightness or candour in failing to deal with the most important question in regard to the whereabouts of the funds in encl. 21 was, standing alone, demonstrative of the real risk of danger or dissipation.

In regard to the statement of claim, my attention was drawn to O. 18 r. 1 of the RHC to the effect that the plaintiffs have 14 days from the date of appearance to file the statement of claim and that would only expire on Monday – referring to 14 July 2003. The appearance was served on 30 June 2003. It was pointed out that the plaintiffs would be filing the statement of claim on 11 July 2003.

Mr. Wong, the learned counsel for the defendant, submitted by way of a rebuttal and he was still harping about the absence of the statement of claim. He emphasised that as he was submitting the plaintiffs have yet to file the statement of claim and so he said that the issues have not been particularised. In fact,

he pointed out that the plaintiffs have introduced a new cause of action. He said that the plaintiffs have now either change their original claim based on the contract for the purchase of shares or added onto that cause of action a new cause of action based on trust. The first cause of action was based on contract, while the second – the new cause of action, was based on equity, on trust.

Mr. Wong then proceeded to submit along the following lines.

That the RHC is quite clear. That these causes of actions which the plaintiffs intend to bring against the defendant must be clearly pleaded stating such particulars as may be necessary to found the cause or causes of actions. That the plaintiffs' arguments thus far concentrated on the issues of trust or constructive trust. Very little was said about the issue of contract.

That the learned counsel for the plaintiffs has used certain terms in the course of his submissions and those terms are inconsistent with a cause of action based on contract. Words like "pledged to be sold", "shares held in escrow", and "funds in constructive trust" were used. These words do not appear in the indorsements in the various summonses in chambers filed in this court including the summons in chambers in encl. 16. The affidavits too did not reflect usage of these terminologies.

In regard to specific performance of the contract, Mr. Wong drew my attention to a book entitled *"Specific Performance"* by Gareth Jones and William Goodhart, particularly from p. 129 to p. 130 where the learned authors wrote:

> A contract to transfer shares in a publicly quoted company will generally not be specifically enforced. Such contracts will only be specifically enforced in exceptional circumstances, for example, if the shares 'are not always to be had in the market' or are not 'dealt in largely on the market' (*Re Schwabacher* [1908] 98 LT 127. Query whether 'the market' for this purpose would include the Unlisted Securities Market or a privately managed over the counter market) or if the contract is for the sale of a controlling shareholding in the company (*Dobell v. Cowichan Copper Co Ltd* [1967] 65 DLR (2d) 440; see *Sharpe Injunctions and Specific Performance* paras 664-68. See also *Chinn v. Hochstrasser* [1979] Ch 447 at 462 per Buckley LJ and at 470 per Goff LJ, holding that in the case of shares in a quoted company damages is normally an adequate remedy for breach).

He also cited the case of *HA Securities Sdn Bhd v. Ng Kong Yeam* [1993] 4 CLJ 433, where Abdul Malek Ahmad J (now FCJ) said at p. 439 of the report:

> In these circumstances, the plaintiff surely cannot now ask for specific performance of the two memorandums of understanding because:

(a) the shares were freely available in the open market, unlike the decision in *Gan Realty Sdn Bhd & Ors v. Nicholas & Ors* [1969] 2 MLJ 110;

(b) the plaintiff had ignored the defendant's letter for one year which amounted to inordinate delay considering the earlier four month(s') lapse since the rights issue was aborted, the case of *Mills & Haywood* [1877] 6 Ch 196 being a case on point;

(c) damages would be an adequate remedy, as decided in *Yeo Long Seng v. Lucky Park (Pte) Ltd* [1971] 1 MLJ 20;

(d) of the fact that the shares had actually been sold before the plaintiff's delayed decision to demand; and

(e) in view of the contra proferentum rule.

Mr. Wong then continued to submit. He said that under the escrow agreement, in order to ensure that the shareholders of the three Singapore Companies are being paid, the defendant as the purchasers of those shares agreed to deposit sufficient number of shares for the payment of S$26,850,000 to the shareholders of the three Singapore Companies. Such shares, according to Mr. Wong, which are deposited may be sold to any director of the company not necessary to the first and the second plaintiffs and if none of these directors take up the offer within 135 days the vendors escrow agent would be at liberty to sell it at the open market. According to Mr. Wong, it has got nothing to do with the present plaintiffs and in any event it does not cover the situation in the present case. Mr. Wong pointed out that the Securities Commission approved the issue of the company's shares with no share available to be deposited in the escrow account with the escrow agent. Mr. Wong pointed out that Dato' Das had argued that by virtue of the sale and purchase agreements in encl. 5 of exhs. "TS7" and "TS8", the plaintiffs have an equitable interests in the shares. According to Mr. Wong, for the sale and purchase of movable property unlike that of the sale of immovable property, a sale and purchase agreement is merely contractual in nature. He submitted that it was a sale and purchase of shares and no monies have passed and no pleadings have been filed. There were no suggestions in the various documents filed that there was a trust pledged or an escrow account in existence in respect of which a mandatory injunction was prayed for. There was a clear default clause where liquidated damages or when the plaintiffs so choose they can pray for specific performance. Mr. Wong then urged me to follow the case of *Teknik Cekap Sdn Bhd v. Villa Genting Development Sdn Bhd (supra)*. He emphasised that these shares are public quoted shares that are freely available in the local market. For all these reasons, he prayed that the amended prayer two (2) of encl. 16 be dismissed with costs.

Dato' Das replied. This was what he said. That the defendant has not addressed the central question pertaining to the whereabouts of the proceeds of the sale of the shares. The defendant does not deny that they sold the shares. But the defendant do not even disclose to the court in its affidavit in reply in encl. 21 as to the quantum of the proceeds of the sale. The defendant has not attempted to answer the plaintiffs' complaint that the affidavit in reply in encl. 21 is lacking in frankness and in candour.

Dato' Das continued further in his submissions. He submitted along these lines.

The summons in chambers in encl. 16 is a limited application to preserve the proceeds of the sale pending the trial. The question before this court is essentially whether the proceeds in the form of a fund ought to be kept in safe keeping pending the trial. The defendant has not addressed this question at all. No where in the submissions advanced by Mr. Wong, has the defendant dealt with the questions of the whereabouts of the fund and its quantum. There was a deliberate omission on the part of the defendant on these relevant and pertinent questions. It was a display of the lack of candour and frankness on the part of the defendant. Instead the defendant has gone into great detail into the merits of the case and has placed reliance on legal technicalities in order to obscure having to answer the main questions as to the amount of the funds and its whereabouts. For instance, the defendant complained of the absence of the statement of claim but admit, on the other hand, that the time for filing the statement of claim under O. 18 r. 1 of the RHC has not set in.

In regard to the case of *Teknik Cekap Sdn Bhd v. Villa Genting Development Sdn Bhd (supra)*, Dato' Das pointed out that that case was decided after the pleadings had been completed – where the defence and the counterclaim of the defendant in that case raised interesting issues.

Now, the correct legal position where an interlocutory application is being heard before pleadings are closed is to examine the issues as raised in the affidavits. Edgar Joseph Jr. J (as he then was) in the case of *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 adopted the same approach and there his Lordship said:

> In my view, paras (i) and (iv) of the indorsement in the amended writ of summons did disclose a cause of action. In any event, the lengthy affidavit of the plaintiff affirmed on 28 January 1991 (encl 5) filed in support of the amended *ex parte* summons-in-chambers (encl 4) pursuant to which I had granted the injunctions had identified a legal right sufficient to give rise to a justiciable cause of action (see *Utusan Melayu (Malaysia) Bhd & Anor v. Chan Tse Yuen* [1989] 1 MLJ 185). This ground therefore failed.

In the present case at hand, several affidavits were filed by either side in respect of the applications in encl. 3 and encl. 16. These affidavits would categorically show that the parties are aware of the legal positions taken by either side.

In regard to the complaint that the words like "trust", "escrow", and "pledge" are not found in the affidavits, Dato' Das responded by saying that these are legal terms which need not be stated in the affidavits provided the facts as stated in the affidavits support these legal arguments. I entirely agree with his submissions.

Be that as it may, the term "escrow" is expressly found in the sale and purchase agreement in encl. 5 at exh. "TS5" at p. 108 thereof and in the Second Supplementary Agreement at the Second Schedule thereto.

In regard to the word "pledge", Dato' Das submitted that it is used by the plaintiffs as a promise to sell which is a contract and not "pledged" as in the sense of providing a security. That, according to Dato' Das, was quite obvious on the facts of the present case and the defendant cannot be misled by it.

In regard to the term "constructive trust", that very term arises from the sale and purchase agreements and also from the causes of actions as stated in the indorsement to the writ.

In regard to constructive trust, I need to refer to a book entitled "*Constructive Trusts"* by M. Cope, a 1992 version. There the learned author wrote at p. 8 to p. 10, the following salient words:

The nature of a constructive trust

The constructive trust has been around since at least the 17th century as a residual category that the courts have called into play when they desired to impose a trust and no other suitable category was available (Waters, op. cit., p 335). Unfortunately no clear view has emerged in Anglo-Australian law as to the nature of a constructive trust. No clear principle has been enunciated as the basis for a doctrine of constructive trusts. The reasons and factors determining the trust property, the beneficiaries, duties and powers of the constructive trustee are not clear. There is a great deal of difference of opinion as to the nature and purpose of the constructive trust and a variety of explanations have been offered to explain the imposition of the trust upon the property held by someone. Different common law jurisdictions have adopted different attitudes towards the person upon whom the trust is to be imposed (Oakley, op. cit., p. 10). As a result a variety of vague and general statements as to the exact nature of the constructive trust are to be found in the Anglo-Australian treatises. It is stated by some authors that the constructive trust will be imposed in circumstances where it would be inequitable to allow the owner to assert full beneficial ownership in property and that it is imposed

where a person holds property in circumstances where as a matter of equity and good conscience it should be held by another (*Hanbury & Maudsley*, op. cit., p. 370). An American judge, Cardozo J., once stated that a constructive trust is imposed whenever property is acquired in such circumstances that holder of the legal title may not in good conscience retain the beneficial interest (*Beatty v. Guggenheim* 122 N.E. 378 at 380 (1919)). There is also a long tradition that the object of the court in imposing a constructive trust is to prevent fraud which would otherwise arise if a person was deprived of particular property which for one reason or another he or she is entitled to (Waters, op. cit., p. 335). The trust is said to arise when, according to the principles of equity, it would be a fraud to deny the trust (*Meagher & Gummow*, op. cit., p. 281). The denial of the trust in these circumstances is often said to be unconscionable. In still other explanations the constructive trust is presented as a means which was developed in equity to make a person account for certain property as if he or she had been a trustee under an express, implied or resulting trust. It is said to have developed as a means of making accountable certain persons in defined circumstances where the justice of the case required that they be accountable for property (Ford & Lee, op. cit., p. 997). The obligation to account for the property was enforced by requiring the title holder to deliver up the property or to acknowledge the rights of the others to the property and sometimes it was enforced by a declaration that created a personal liability to account without in any way affecting specific property held by the defendant. A further explanation used to explain the constructive trust is that of unjust enrichment. A constructive trust is said to be imposed in order to prevent unjust enrichment (This theory is discussed in more detail below. Chapter 2).

It is not difficult to find examples of a court having imposed a constructive trust for one or other of the above reasons. Each reason taken by itself however is not sufficient to explain the diversity of situations in which constructive trusts have been imposed and such generalisations offer 'little guidance as to the actual situations' (Waters, op. cit., p 335) in which the courts have been prepared to impose the trust. Nevertheless it is possible to conclude at least that notions of restitution or the prevention of fraud provide in many instances the underlying rationale for the imposition of most constructive trusts. Finally it should be noted that little attention has been given to the word 'constructive' when used in this context. The editors of Jacobs' Law of Trusts in Australia suggest that the trust is 'constructive' in that equity construes the circumstances by explaining or interpreting them and that the trust is not a trust which is construed by equity. What equity does is to attach legal consequences to the circumstances (*Meagher & Gummow*, op. cit., p. 281).

And I gratefully adopt them. According to the case of *A.W. Scott* [1955] 71 LQR 39, in some jurisdictions the constructive trust is regarded as a remedy for many cases of unjust enrichment. Cardozo J in *Beatty v. Guggenheim Exploration Co.* [1919] 225 NY 380 at 386 aptly said:

> … a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

It is a correct assertion of the law to say that constructive trusts arise by operation of law. Equity comes into play. And equity says that in certain circumstances the legal owner of a property must hold it on trust for others. No formalities are required. The term "constructive trusts" has been used in different senses and in different situations. It can cover the duty of a trustee who has obtained benefits by fraud. It can also cover the obligation of a trustee who has made a profit, however innocently, through his office, to hold such profit for the benefit of his beneficiaries (*Keech v. Sandford* [1726] Sel. Cas.t. King 61; and *Boardman v. Phipps* [1967] 2 AC 46). In *Eves v. Eves* [1975] 1 WLR 1338, Lord Denning MR brilliantly engineered a constructive trust "of a new model," to be imposed, according to his Lordship, "whenever justice and good conscience required it ..." In *Hussey v. Palmer* [1972] 1 WLR 1286 at p. 1289, Lord Denning MR succinctly said that a constructive trust is an equitable remedy "by which the court can enable an aggrieved person to obtain restitution."

According to Dato' Das, there are two types of constructive trusts that arise from the facts. The first is the escrow arrangement contained in the sale and purchase agreements particularly cls. 1.2(a) and 1.2(b) of exh. "TS5" of encl. 5 at p. 108. By way of a reply to the argument that the plaintiffs are not parties to the escrow agreement, Dato' Das submitted that the plaintiffs are, in fact, the beneficiaries of the protection given by and under the escrow arrangement. For this purpose, Dato' Das relied on cls. 1.2(a) and 1.2(b) of the Second Schedule of encl. 5 at p. 108 thereto and he further submitted that the plaintiffs are the only directors who had entered into the buy-back arrangements. According to him, the escrow arrangement by virtue of it being an escrow requires the defendant not to deal with the shares and for this proposition he relied on the case of *Alan Estates Ltd. v. W.G. Stores Ltd. And Another* [1981] 3 WLR 892, CA. In regard to the alleged inadequacies of the affidavit of the first plaintiff in encl. 17, Dato' Das submitted that such an argument was totally untenable and he advanced the following reasons:

(1) That the escrow arrangement and the Buy-Back Agreements are part of the same transaction or for that matter they are two sides of the same coin. This can be appreciated by taking into account the fact that the escrow is for a period of 135 days which proximate to the four (4) months period for completion under the buy-back arrangement.

(2) The escrow arrangement requires quite clearly that the shares be placed in escrow for 135 days in order to enable the plaintiffs to complete the buy-back. This is the whole object of the buy-back arrangement.

(3) It is incorrect for the defendant to contend that the escrow arrangement is for the protection of the Singaporean share holders. It must be categorically stated that the Singaporean share holders are not the buyers of the shares. The plaintiffs are, in fact, the buyers. So, the Singaporean share holders have no interest in the shares other than in the proceeds of the sale.

The second type of constructive trust, according to Dato' Das would be this. By selling the shares during the window period of four (4) months, the defendant has practised fraud or deception. This is clearly set forth in the indorsement in the writ as seen in encl. one (1). In law, the proceeds from a fraud are governed by constructive trust. The case of *Paragon Finance plc v. DB Thakerar & Co (a firm), Paragon Finance plc and another v. Thimbleby & Co. (a firm) (supra),* CA, would be a classic example. Moreover, the existence or non-existence of a constructive trust is essentially a question of law and not of fact. It is based on the doctrine of unconscionability (Paragon Finance).

I hasten to add that on the facts, the transaction contemplates an escrow arrangement for a period of 135 days wherein the defendant is obliged to keep the shares in escrow, that is, in safe keeping. When the defendant disposed off the shares, the defendant is obliged to keep the proceeds of that sale in safety pending the plaintiffs' claim for the block of shares. One hundred and thirty-five (135) days is computed from the date of listing of the shares which was on 3 June 2003 and the sale took place almost immediately after the listing. The sale took place from 3 June 2003 to 16 June 2003 when the *ex parte* injunctive order was served.

Now, one hundred and thirty-five (135) days calculated from 3 June 2003 would end on 8 October 2003. So, it can be readily noted that the sale of those shares took place during the period of the escrow.

In regard to the completion dates and when the purchase price is payable, I have this to say. The purchase price is payable only on the completion date of the buy-back of the shares. Currently, there is an active dispute between the plaintiffs and the defendant in regard to the completion dates. The plaintiffs rely upon the Buy-Back Agreements in encl. 5 in exhs. "TS7" and "TS8" and they say that the date would be 7 July 2003. It must be noted that the defendant did not turn up on that day. Instead, the defendant relied on the undated, unstamped and unwitnessed alleged agreement with the second plaintiff as reflected in exh. "KHL1" of encl. 9 and the defendant say that the completion

date was on 28 June 2003. The defendant's letter of 26 June 2003 as seen in exh. "KHL5" of encl. 9 stated that the completion date to be 28 June 2003. Now, the upshot of these rival positions would be this. That there is now a serious dispute between the parties as to the completion date. A trial is the best answer.

To say as was said by the defendant that the plaintiffs are not able to complete the sale transactions would be going too far and clearly untenable. In exh. "TS20" of encl. 11, a credit facility of RM81.25 million can be seen in favour of both the plaintiffs. That very credit is addressed to both the plaintiffs and not as suggested by the defendant that it was addressed to only the second plaintiff.

This judgment has gone too far. I have tried to cover most of the grounds. It is not for this court, at this stage, to decide on the merits of the case as was raised by the defendant at great length. I too cannot, at this stage, consider the merits and decide conclusively on them. This is not the time to do so. This is an application under O. 29 r. 2 of the RHC for the interim preservation of the subject matter. The question of merits on the main issue of the cause of action is, with respect, strictly not relevant at this stage. This court, at this stage, needs only to be satisfied that there are triable issues of the facts and the law to be examined at the trial and whether, in the interim, the subject matter of the dispute should be preserved. I certainly look forward to the trial in open court in the near future. It would certainly be interesting.

I must categorically say that Mr. Wong has done justice to his client. He has raised plenty of issues but I can't, at this stage, consider all the issues raised by him. As it is, this judgment is already long. But I will certainly consider all those issues at the trial proper.

Both Dato' Das and Mr. Wang added spice to the whole case. Interesting arguments were advanced by these fine gentlemen at the bar.

This being an application to preserve the property as phrased and framed in the amended prayer two (2) of encl. 16, I cannot inquire into the merits of the case. On this point, I need to refer to the case of *Johnson v. Tobacco Leaf Marketing Board* [1967] VR 427, a decision of Gowans J. In that case his Lordship had to consider the ramifications of O. 50 r. 3 of the Rules of the Supreme Court which are broadly similar to our O. 29 r. 2 of the RHC. At p. 430 of the report, his Lordship Gowans J had this to say:

> The power which the plaintiffs invoke, however, is that conferred by O. L, r. 3: 'It shall be lawful for the Court or a Judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid, to authorise any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid, to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.
>
> When an application is based upon the provisions of that rule, an inquiry into the merits is not required. In *Campbell v. Brownless* [1901] 26 VLR 609, at p. 611; 7 ALR (CN) 9, Hood, J, said: 'I think that an application under Order L r. 3 should be dealt with irrespective of the merits. It is not intended under that rule to investigate the question of whether the plaintiff is right or the defendant right; it is merely to have the subject-matter brought into Court, and the Court is afterwards to settle to whom it is to belong.
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> The last part of the observation may be unduly narrow in envisaging the circumstances which will permit of the exercise of the power, but I accept it that a consideration of the merits of the respective cases is not demanded. What is involved is an exercise in salvage, pending, and for the purpose of, the ultimate determination. It is, therefore, relevant to consider what will be involved in that determination, and how it relates to the property sought to be preserved, and what justice demands in the way of making an order for the preservation of the property so as to prevent a determination one way or the other proving abortive.

I reiterate that there is not single averment from the defendant as to the amount made from the sale of those shares during the escrow period. Neither was there any disclosure as to where the money is being kept. These facts have been completely kept away from the knowledge of this court. Surely the defendant should know about them. The defendant do not deny the sale of those shares at all. Where is the money? What has happened to the proceeds of the sale of those shares? All these questions can easily be answered by the defendant. But alas, nothing appeared in the defendant's affidavits. In law, an unsatisfactory explanation by a custodian of money as regards its whereabouts would lead to an order for payment of the money into court pending trial (*Sebaya Sdn. Bhd. v. Syarikat Bekerjasama Ladang Kelapa Sawit Pegawai-Pegawai Negeri Pahang Berhad* [1980] 2 MLJ 23). In *Sebaya*, there was at least an attempt to give accounts of the monies received. Here, there is not even a feeble attempt by the defendant. Indeed as was said by Dato' Das, the defendant's silence is deafening. The defendant simply played possum. The defendant do not even

want to tell this court as to the quantum which the defendant had received from the sale of those shares. Why the silence? It must be borne in mind that the sale took place during the escrow period. It is obvious that it is the Singaporean directors and shareholders who are in control. It is of little comfort to say that 60% of the shareholdings belong to Malaysians. In the course of the submissions, Mr. Wong revealed that the defendant was waiting for a Singapore citizen to come up to Kuala Lumpur to affirm the affidavits. The response from Dato' Das was quite apt and proper. He said that the Malaysian shareholders are mere nominees or mere figure head persons and that the defendant is essentially controlled by the Singaporeans.

Now, where one party has pledged to sell property or, in this case, a block of shares to another party, the purchaser acquires equitable rights over the shares. If the vendor proceeds to dispose off that same block of shares to a third party, he has violated the equity of the purchaser and any proceeds he holds from the proceeds of the sale he holds it as a constructive trustee. It is as simple as that. It is this fund that was created by the unlawful sale that the plaintiffs are seeking to preserve by way of an interim protection. It is, in fact, the very subject matter of the writ.

Conclusion

For all these reasons, I gave an order in terms of encl. 16 particularly prayer two (2) as amended.

I refused to allow a stay that was asked for orally. The very nature of this application in encl. 16 calls for a swift legal intervention. It would be self defeating if the stay is granted. There are no special circumstances to warrant a stay. The plaintiffs must be allowed to enjoy the fruits of their success. Mr. Wong did submit that the defendant would not supply the information until ordered by this court. So this order of this court in encl. 16 as per prayer two (2) as amended now requires the defendant to supply the information by way of an affidavit. At any rate, the proceeds of the sale of those shares are placed in the defendant's solicitor's account. In the meantime, I advised Mr. Wong to file a formal application for a stay.

In view of the lengthy hearing and the large number of authorities cited by the parties, I make an order that costs should rightly go to both the plaintiffs and that costs should follow the event.